STATE OF MICHIGAN

COURT OF APPEALS

DVI CAPITAL COMPANY,

Plaintiff-Appellee,

v

JAMES V. ZELCH, JAMES V. ZELCH, M.D., P.C., DAVID McCURDY, LARRY DERRYBERRY, and BARRY SWITZER,

Defendants-Appellants,

and

UPSTATE OPEN MRI/DIAGNOSTIC IMAGING, INC., MEDICAL IMAGING SYSTEMS, INC., MED CARE INTERNATIONAL, ANTHONY DEFEO, RALPH A. COGNETTI, JOHN C. CHERUNDOLO, and RANDY V. MONTROSE,

Defendants.

UNPUBLISHED
July 22, 2003

No. 232732, 236515, 236517, 232813
Oakland Circuit Court
LC No. 97-545942-CK

Before: Smolenski, P.J., and White and Wilder, JJ.

PER CURIAM.

In this action for breach of contract, defendants Zelch and James V. Zelch, M.D., P.C., (the Zelch defendants) appeal the trial court's order denying their motion for summary disposition. Additionally, the Zelch defendants, together with defendants McCurdy, Derryberry, and Switzer, (collectively, "defendants") appeal the trial court's order granting plaintiff's motion to compel arbitration and the trial court's orders denying defendants' motions to vacate the arbitration awards. We affirm the trial court's denial of the motion for summary disposition and reverse the trial court's grant of plaintiff's motion to compel arbitration.

I. Facts and Proceedings

In June 1997, plaintiff filed a verified complaint alleging that defendants Upstate Open MRI/Diagnostic Imaging, Inc., (Upstate) and Medical Imaging Systems, Inc., (MIS) defaulted on equipment leases that each company entered into with defendant Equipment Leasing Specialists,

Inc., (ELS).[1] ELS assigned plaintiff its rights under the Upstate lease in an agreement dated January 11, 1996, and assigned plaintiff its rights under the MIS lease in an agreement dated January 29, 1996. Plaintiff asserted that it was entitled to possession of the property by virtue of the default of defendants Upstate and MIS.

Plaintiff also asserted that the Zelch defendants signed guaranties securing payment of the Upstate lease and that defendant Zelch, individually, executed a guaranty concerning the MIS lease. Plaintiff alleged that the Zelch defendants defaulted on the terms of the guaranties by failing to pay sums due to plaintiff. Similarly, plaintiff alleged that defendants McCurdy, Switzer, and Derryberry each defaulted on the terms of guaranties they executed for the Upstate lease and the MIS lease.[2]

After filing suit, plaintiff moved for possession of the equipment, which the trial court granted. Litigation proceeded with extensive discovery, motions for summary disposition, two case evaluation decisions, trial preparation, plaintiff's motion for separate trials, and several adjournments of the trial date. In October 1998, the trial court ordered the parties to participate in non-binding facilitative mediation. The trial court also ordered a status conference to be held on December 18, 1998, to determine whether, in the event facilitative mediation was not successful, the parties would submit to binding arbitration or schedule another trial date.

In February 1999, the Zelch defendants filed a motion for summary disposition based on MCR 2.116(C)(10), arguing that the guaranties had not been assigned to plaintiff and that plaintiff, therefore, could not enforce them.[3] Plaintiff responded with a request for summary disposition based on MCR 2.116(I)(2) and a cross-motion for summary disposition, asserting that the guaranties were assignable and actually assigned to plaintiff and that, therefore, there was no genuine issue of material fact except for the amount of damages. The trial court granted summary disposition to plaintiff, finding defendants liable on the guaranties as a matter of law. On reconsideration, the trial court modified its order to clarify that while the guaranties were assignable and enforceable, defendants were not precluded from asserting other affirmative defenses concerning the guaranties.

One month later, on July 6, 1999, plaintiff moved to compel arbitration. In support of its motion, plaintiff relied on language in the guaranties stating that disputes concerning the guaranties

> will be resolved at the Lessor's option in its sole discretion either (a) by arbitration in the State of Michigan in accordance with the Rules and Practices of

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[1] Throughout this opinion, the lease agreement between Upstate and ELS is referred to as "the Upstate lease" and the lease between MIS and ELS is referred to as "the MIS lease."

[2] Plaintiff raised a number of other claims in the complaint that are not relevant on appeal, including claims against defendants who are not parties to this appeal.

[3] Defendants Derryberry, Switzer, and McCurdy joined in the Zelch defendants' motion for summary disposition.

> the American Arbitration Association and a judgment on the award may be entered by any court of competent jurisdiction, or (b) in any state or federal court in the State of Michigan.

Plaintiff asserted that it was now exercising its option to arbitrate, and requested the trial court to order the case to arbitration. Defendants opposed plaintiff's motion, arguing that plaintiff had chosen to litigate in circuit court rather than arbitrate and, therefore, had waived any right it had to arbitrate its claims. The trial court granted plaintiff's motion to compel arbitration, finding that the plain language of the contract supported plaintiff's choice to arbitrate at this stage of the proceedings.

Arbitration proceedings took place in accordance with the rules of the American Arbitration Association, and an arbitration panel rendered an award in plaintiff's favor. The trial court granted in part defendants' subsequent motion to vacate the award, because the panel exceeded its authority by rendering separate damage awards for each defendant. After remand, the panel issued an amended award in plaintiff's favor. Defendants moved to vacate the amended arbitration award as well, but the trial court rejected defendants' arguments and confirmed the award. Judgment was entered against defendants on August 9, 2001, and this appeal ensued.

II. Standards of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Fowler v Auto Club Ins Assoc*, 254 Mich App 362, 363; 656 NW2d 856 (2002). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when genuine issues of material fact do not exist and the moving party is entitled to judgment as a matter of law. *Id.*

The interpretation of a contract is an issue of law subject to de novo review. *Old Kent Bank v Sobczak*, 243 Mich App 57, 61; 620 NW2d 663 (2000). Moreover,

> [w]hether one has waived his right to arbitration depends on the particular facts and circumstances of each case. . . . We review de novo the question of law whether the relevant circumstances establish a waiver of the right to arbitration . . . and we review for clear error the trial court's factual determinations regarding the applicable circumstances. [*Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001).]

III. Analysis

A. Defendants' Motion for Summary Disposition

The Zelch defendants first argue that the trial court erred in finding that the guaranties were validly assigned despite the fact that they were not assigned independently and separately from the assignment of the leases. We disagree. The Zelch defendants argue that *Aiton v Slater*, 298 Mich 469; 299 NW 149 (1941), the authority underlying the trial court's decision, is factually distinguishable because (1) the guaranties at issue here were not attached to the leases when the leases were assigned to plaintiff and (2) the underlying obligation in *Aiton* was a negotiable instrument, unlike the equipment leases at issue.

In *Aiton*, the Court held that a guaranty attached to a bond was transferred when the bond was transferred and could be enforced by the transferee. *Id.* at 479. As the *Aiton* Court stated,

> "The general rule applicable to assignments of choses in action is that the assignment, unless there is a contract to the contrary, carries with it 'all securities held by the assignor, collateral to the claims and all rights incidental thereto, and vests in the assignee the equitable title to such collateral securities and incidental rights.' . . . Under this rule, it was immaterial that the guaranty [at issue in *McGowan*] was not assigned at the same time the notes were, as the assignee had the same rights to subject the securities to payment of the debts as the assignor had." [*Id.* at 480, quoting *McGowan v Wells' Trustee*, 184 Ky 722; 213 SW 573, 578 (1919).]

While defendants claim that, because the guaranties are not "securities" held as collateral or "incidental rights," the general rule does not apply in this case, we conclude that the guaranties act as "securities" for payment due under the leases, just as the guaranty did in *McGowan*. Therefore, the general rule applies in this case.

Additionally, the factual differences between the present case and *Aiton* are unimportant. The holding in *Aiton* should not be read so narrowly as to apply only to negotiable instruments or guaranties that are physically attached to the underlying obligation. For example, in *Atwood v Schlee*, 269 Mich 322; 257 NW 712 (1934), the Supreme Court held that the right to a mortgage that secured a mortgage note passed to the transferee when the note was transferred, even though the mortgage was not affixed to the note and the transferee did not know about the mortgage at the time of the transfer. *Aiton, supra* at 480.

The Zelch defendants also argue that a separate assignment of the guaranties is necessary because a guaranty is a contract separate from the underlying obligation. This argument lacks merit. The cases on which defendants rely merely state that a guaranty is a contract and should be interpreted according to contract principles. *Morris & Co v Lucker*, 158 Mich 518, 520; 123 NW 21 (1909); *First Nat Bank of Ypsilanti v Redford Chevrolet Co*, 270 Mich 116, 121; 258 NW 221 (1935). Accordingly, because the assignment of the leases effected the transfer of the guaranties, the trial court properly denied defendants' motion for summary disposition on this basis.[4]

[4] The Zelch defendants also vaguely argue that the enforceability of the guaranties is affected by the fact that the assignments transferred ELS's rights but not its obligations. They fail, however, to provide any support for this argument. Similarly, the Zelch defendants claim that because the assignment was not made until April 1999, plaintiff is liable to them for attorney fees, lease payments, late fees, and interest that they paid plaintiff before April 1999. This argument, too, is unsupported. This Court will not look for authority to support a party's position on appeal, *Chapdelaine v Sochocki*, 247 Mich App 167, 174; 653 NW2d 339 (2001), and we decline to address these issues.

Alternately, the Zelch defendants assert that even if the guaranties were transferred by virtue of the lease assignments, the guaranties are unenforceable because subjecting defendants to multiple liabilities constitutes a material change in their obligations. We disagree. "Any material alteration of a principal debt or obligation operates to completely discharge any guaranty of that debt or obligation." *Wilson Leasing v Seaway Corp*, 53 Mich App 359, 369; 220 NW2d 83 (1974). The Zelch defendants fail to identify any obligation that the transfer of the guaranties alters. The assignment did not change the payment terms of the guaranties. The only change in defendants' obligation is to whom they should make payment, a change that does not result in an invalid assignment. Although a contracting party cannot change by assignment the performance required under the contract, the contracting party "has the power to substitute a new party as a holder of the right" of performance. *Kingston v Markward & Karafilis, Inc*, 134 Mich App 164, 172; 350 NW2d 842 (1984), quoting 4 Corbin, Contracts § 868, pp 468-469 (1951). Therefore, plaintiff's status as the holder of the right of performance does not constitute a material change in the contract that would operate to discharge defendants' liability. Accordingly, the trial court properly denied defendants' motion for summary disposition on this basis as well.

B. Plaintiff's Motion to Compel Arbitration

Defendants contend that the trial court erred by failing to conclude that plaintiff waived its right to arbitrate. We agree. Finding a waiver of a contractual right to arbitrate is disfavored in the law. *Madison Dist Pub Schools*, *supra* at 588. "The 'party arguing there has been a waiver of this right bears a heavy burden of proof' and 'must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts.'" *Id.*, quoting *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 356; 637 NW2d 526 (1998).

The parties do not dispute plaintiff's knowledge of an existing right to compel arbitration. Plaintiff drafted the guaranty documents containing the choice of forum clause and instituted litigation based on the guaranties. It is clear that plaintiff had knowledge of its right to arbitrate disputes arising out of the guaranties.

The parties hotly contest, however, whether plaintiff engaged in acts inconsistent with its right to arbitrate. The trial court opined that plaintiff did not act inconsistently with its right to arbitrate because the guaranties give plaintiff the *unlimited* right to choose arbitration or litigation. We conclude that the trial court misconstrued the language of the guaranties. "The primary goal in interpreting contracts is to determine and enforce the parties' intent. . . . To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Old Kent Bank*, *supra* at 63. "[W]hen a contract is ambiguous, this Court may construe the agreement in an effort to find and enforce the parties' intent." *Id.* If two constructions of a contract are possible and one reading renders the contract unfair or unjust, the Court will prefer the construction that is reasonable and just. *Id.*, citing *Terra Energy, Ltd*, 223 Mich App 176, 188; 565 NW2d 887 (1997); *Siegel Co v Codd*, 183 Mich 145, 153; 149 NW 1015 (1914).

The guaranties at issue[5] give plaintiff the "option" to resolve claims arising out of the guaranties "either (a) by arbitration . . . or (b) in any state or federal court in the state of Michigan." We conclude that the trial court's construction of the choice of forum clause violates the express terms of the contract by giving plaintiff the right make one selection *and* make another selection.[6] The terms "either . . . or" do not mean "and" or "both" and do not imply limitless choices. The terms denote a selection of one alternative.[7]

A similar conclusion was reached by the court in *SATCOM Int'l Group PLC v ORBCOMM Int'l Partners*, 49 F Supp 2d 331, 338 (SD NY, 1999), which stated that a party with an option of choosing arbitration or litigation could not choose litigation and then choose arbitration:

> There is no provision in the [agreements] to permit a party to make the choice between litigation and arbitration a second time for the same dispute or to jump back and forth between the two options for dispute resolution at its whim or when it meets with an adverse ruling. Because endorsement of such a right would be so unusual and potentially expensive to both parties, it would be expected that the right to remake the choice—if such right existed—would be specifically addressed in the agreements and it is not. [*Id.*]

As in *SATCOM*, here the guaranties at issue do not expressly permit plaintiff to remake its choice.

Plaintiff further contends that the contracts provide that plaintiff's rights and remedies under the contracts are cumulative, and that, therefore, the election of one right does not preclude the election of another right. This argument has not been properly preserved because plaintiff failed to raise it in the trial court. *Fast Air, supra* at 549. However, because plaintiff's argument concerns an issue of law, we will briefly address it. *Steward, supra* at 544. We conclude that plaintiff's argument lacks merit. Neither the cumulative rights clause[8] nor the non-waiver

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[5] Defendant James V. Zelch, M.D., P.C., accurately states that its guaranty does not contain the same arbitration provision found in the other guaranties, but admits that this difference was not brought to the trial court's attention. Argument regarding the specific language in this guaranty is, therefore, not preserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Although this Court has the authority to review an unpreserved issue when the issue is one of law for the Court to decide, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), we decline to do so in this particular case in light of our resolution of the issue.

[6] If the trial court's reasoning is taken to its extreme, plaintiff could have changed its choice of forum back to litigation after arbitration proceedings began.

[7] "Either" is defined as "one or the other of two." It is also defined as "a coordinating conjunction that, when used with *or*, indicates a choice." *Random House Webster's College Dictionary* (1995). "Or" is "used to connect words, phrases, or clauses representing alternatives." *Id.*

[8] The leases provide that "[t]he rights and remedies of Lessor hereunder are in addition to all other rights and remedies provided by law. All of Lessor's rights and remedies are cumulative

(continued…)

clause[9] on which plaintiff relies are found in the guaranties. Instead, the clauses are found in the underlying leases, the terms of which are not incorporated in the guaranties.

To the extent that plaintiff invites the Court to construe the guaranties and leases together for purposes of determining plaintiff's arbitration rights, we do not accept plaintiff's invitation. Generally, "in order to ascertain the intention of the parties, separate . . . instruments, executed at the same time between the *same* parties, or in other words, made as parts of substantially [one] transaction, *may* be taken together and construed as [one] instrument." *Nogaj v Nogaj*, 352 Mich 223, 231; 89 NW2d 513 (1958) (emphasis added). Because defendants were not parties to the leases, we will not read the documents as one.

Additionally, although the guaranties themselves state that "[a]ll of [plaintiff's] rights hereunder are cumulative and not alternative," nevertheless, this language does not grant plaintiff the right to choose both litigation and arbitration. The "right" granted by the choice of forum clause in the guaranties is the right to make a choice, the lessor's "option,"[10] and the choice to litigate or to arbitrate is not cumulative. To read the terms of the contract otherwise would render the words "either" and "or" meaningless or would create an ambiguity in the terms of the contract. A construction of the contract that gives plaintiff the right to vacillate between litigation and arbitration would not only be unreasonable, it would run contrary to the rationale behind encouraging arbitration. See *Madison Dist Pub Schools, supra* at 600 (stating that it is public policy in Michigan to encourage arbitration "as an inexpensive and expeditious alternative to litigation").

Because the guaranties do not grant plaintiff limitless choices, we proceed to consider whether plaintiff waived its right to choose arbitration by engaging in acts inconsistent with its right to arbitrate. In *Madison District Public Schools*, the Court described a number of acts that can indicate the waiver of a right to arbitrate. Plaintiff engaged in several of those acts, including filing a complaint,[11] engaging in discovery,[12] seeking summary disposition, filing a witness list (and seeking permission to amend it), and participating in mediation.[13] *Madison Dist*

(…continued)

and not exclusive, and may be exercised separately or concurrently and in such order and manner as Lessor may determine. The exercise of any one remedy shall not be deemed to be an election of such remedy or to preclude the exercise of any other remedy. . . ."

[9] The leases provide that "[n]o waiver or amendment of this Master Lease . . . or any provision hereof . . . shall be effective unless in writing signed by Lessor. No delay or failure to exercise any right, power or remedy accruing to Lessor upon any default of Lessee shall impair any such right, power, or remedy . . . ."

[10] The word "option" is defined as "the power or right of choosing." *Random House Webster's College Dictionary* (1995).

[11] *Joba Const Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 179; 388 NW2d 251 (1986).

[12] "Pursuing discovery is regarded as being inconsistent with demanding arbitration, since discovery is not generally available in arbitration." *Joba Const Co, Inc, supra* at 179.

[13] This case proceeded through two sessions of case evaluation and one session of facilitative mediation before plaintiff moved to compel arbitration.

Pub Schools, *supra* at 589, 597. Plaintiff participated in litigation for approximately two years before moving to compel arbitration. See *id.* at 590, 596.

Plaintiff argues, however, that it had to institute litigation because its claims against the lessees were not arbitrable. Plaintiff further claims that for a majority of the two-year time period between filing suit and filing its motion to compel arbitration, "litigation was in abeyance (and trial settings were cancelled) in deference to three rounds of mediation," and that it did not move for summary disposition until defendants moved for summary disposition. Nevertheless, we believe it is significant that plaintiff initiated the trial court proceedings. Plaintiff could have initiated arbitration on the guaranties before or contemporaneously with a suit on its non-arbitrable claims. Moreover, once plaintiff instituted suit without simultaneously seeking arbitration, defendants were required to defend against all claims that could be asserted by plaintiff. On the record before us, we find that defendants have satisfactorily demonstrated that plaintiff engaged in acts inconsistent with its right to arbitrate, fulfilling the second element of the *Salesin* test.

The third element of the test requires defendants to show that they were prejudiced as a result of plaintiff's acts.[14] *Madison Dist Pub Schools*, *supra* at 588. We conclude that defendants' expenditure of time and resources during approximately two years of litigation constitutes prejudice sufficient to effect a waiver of plaintiff's right to arbitrate. *Id.* at 599-600; *Salesin*, *supra* at 356-357.

In sum, the trial court erred by concluding that plaintiff did not waive its right to arbitrate and, consequently, erroneously compelled arbitration. Because plaintiff waived its right to arbitrate, the arbitration awards are invalid and defendant's arguments contesting the validity of the arbitration awards are rendered moot.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kurtis T. Wilder

[14] Having found that defendants did not satisfy the second element of the *Salesin* test, the trial court did not reach the prejudice inquiry.